U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-H-C-P-, INC.

DATE: FEB. 19, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of temporary, healthcare personnel, seeks to employ the Beneficiary as a nurse supervisor. It requests her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. organization to sponsor a foreign national for lawful permanent resident status to work in a job requiring a master's degree, or a bachelor's degree followed by five years of experience. The Petitioner also requests classification of the position under Schedule A, a designation for shortage occupations that would streamline the immigration process. 20 C.F.R. § 656.5(a).

The Director of the Nebraska Service Center denied the petition and the Petitioner's following motion to reconsider. The Director concluded that the record did not establish the position's qualifications for Schedule A or EB-2 classification. The Director also found that the Petitioner did not demonstrate its ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence. It asserts that the Director misinterpreted the minimum job requirements of the position and erred in finding that the company bases its ability to pay the proffered wages on speculative, future profits.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional typically follows a three-step process. To permanently fill a job in the United States with a foreign national, an employer first obtains certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If the DOL certifies a position, an employer then submits the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, the foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

The DOL, however, has already determined that the United States lacks able, willing, qualified, and available professional nurses and that employment of foreign nationals in this Schedule A occupation will not hurt the wages and working conditions of U.S. workers with similar jobs. 20 C.F.R. § 656.5. Thus, if the position qualifies for Schedule A designation, DOL regulations would authorize USCIS to adjudicate the labor certification application in this matter during these proceedings. *See* 20 C.F.R. § 656.15(e) (describing a Schedule A labor certification determination by USCIS as "conclusive and final").

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of a petitioner's annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS considers whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full wage, USCIS examines whether it generated annual amounts of net income or net current assets sufficient to pay any differences between the annual proffered wage and the actual wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[1]

Here, the labor certification application states the proffered wage of the offered position of nurse supervisor as $70,000 a year. The petition's priority date is October 7, 2016, the date of its filing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). As of this appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2018 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2016 and 2017.

The record lacks evidence that the Petitioner paid the Beneficiary wages in 2016 or 2017. Based solely on wages paid, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

The Petitioner submitted copies of its federal income tax returns for 2016 and 2017. The 2016 return reflects net income of $45,901 and net current assets of $266,579. The 2017 return reflects net income of $174,135 and net current assets of $320,585. The net income amount for 2016 and the net current asset amounts for both 2016 and 2017 exceed the annual proffered wage of $70,000. The record therefore appears to establish the Petitioner's ability to pay the Beneficiary's individual proffered wage in 2016 and 2017.

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015).

As the Director noted, however, USCIS records indicate the Petitioner's filing of multiple petitions for other beneficiaries. Until a beneficiary obtains lawful permanent residence, a petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and other petitions that were pending or approved as of this petition's priority date of October 7, 2016, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

USCIS records indicate that the Petitioner filed 48 other petitions that were pending or approved as of October 7, 2016, and 30 others thereafter in 2016 or 2017. In a notice of intent to deny (NOID) the petition, the Director asked the Petitioner to submit information and evidence regarding its other applicable petitions. The Petitioner, however, has not provided the requested information and evidence. Thus, the record lacks the proffered wages and priority dates of the other petitions. The Petitioner also did not submit evidence of any wages it paid the other beneficiaries or of their attainment of lawful permanent residence. Without this information and evidence, we cannot determine the Petitioner's ability to pay the combined proffered wages. Because the Petitioner did not submit requested, material evidence of its ability to pay, we will dismiss the appeal. *See* 8 C.F.R. § 103.2(b)(14) (allowing a petition's denial where a petitioner omits requested evidence that precludes a material line of inquiry). In the absence of the requested evidence, we also decline to consider other factors affecting the Petitioner's ability to pay under *Sonegawa*. Without a full picture of the Petitioner's total wage obligations, we cannot find the totality of the Petitioner's circumstances sufficient to demonstrate its ability to pay.

On appeal, the Petitioner submitted evidence that it would pay the Beneficiary in the offered position less than the amount it would receive for her services from a client. Because the Beneficiary would generate more revenue than her pay, the Petitioner argues that it has the ability to pay her proffered wage. Under 8 C.F.R. § 204.5(g)(2), however, the Petitioner must demonstrate its ability to pay "at the time the priority date is established." The record does not establish that, as of this petition's October 7, 2016, priority date, the Beneficiary began working and generating revenue for the Petitioner. The Petitioner's argument therefore does not demonstrate its continuous ability to pay the proffered wages of the Beneficiary, or those of its other beneficiaries who did not begin working as of the priority dates of their petitions.

III. ELIGIBILITY FOR THE CLASSIFICATION SOUGHT

The Director also denied the petition finding that the record did not establish the position's qualifications for Schedule A or EB-2 classification. However, because the Petitioner's lack of

[2] A petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew or that were denied or revoked without currently pending appeals. A petitioner also does not have to demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions or after corresponding beneficiaries attained lawful permanent residence.

ability to pay is dispositive in this case, we need not reach the issue of the requested classification and therefore reserve it.

IV. CONCLUSION

The record on appeal does not demonstrate the Petitioner's continuing ability to pay the combined proffered wages of this and other applicable petitions. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-C-P-, Inc.*, ID# 2902478 (AAO Feb. 19, 2019)